

FULL BEST-VALUE EVALUATION OF SCHEDULE ORDERS AND BLANKET PURCHASE AGREEMENTS DOES NOT LIMIT USE OF A SOCIOECONOMIC STATUS EVALUATION FACTOR TO MERELY THAT OF A TIE-BREAKER FOR QUOTES OF EQUAL PRICE¹

A. FACTS.

While preparing the source selection evaluation factors for a nationwide Schedule BPA covering construction management, the Contracting Officer (CO) considered market research regarding the socioeconomic status (including business size and other attributes) and geographic distribution of Schedule contractors. In order to maximize the probability of selecting best-value Small Business contractors with demonstrated capacity and capability, the CO developed weighted evaluation factors for both large projects and small projects. The four major evaluation factors for both small and large projects were: Technical (including Experience, Technical Approach, and Capacity), Past Performance, Price, and Socioeconomic Status. Based on the market research and the agency requirements, the factors for award of the large project work had relative weightings different than those of the small project evaluation factors, but both “lots” included Socioeconomic Status as a weighted evaluation factor intended for use in the source selection’s tradeoff analysis.

B. ISSUE.

When selecting best-value evaluation factors for Schedule orders or BPAs, is a Contracting Officer *prohibited* from using the socioeconomic status of Schedule contractors as a weighted evaluation factor rather than merely as a tie-breaker for quotes with equal prices?

C. DECISION.

No. There is no statute, regulation, or policy restricting a Contracting Officer’s reasonable discretion in using a Schedule contractor’s socioeconomic status as a best-value evaluation factor, even including giving primary weight to such a non-price factor as part of a tradeoff analysis. There is no governing regulation or policy limiting the use of a socioeconomic status evaluation factor to only that of a tie-breaker for quotes of equal price.

¹ April 24, 2009; david.clemens@gsa.gov.

D. RATIONALE.

The Federal Acquisition Regulation (FAR) gives broad discretion to Contracting Officer in selecting and weighting best-value evaluation factors. FAR subpart 8.4 makes it clear that Contracting Officers have the latitude to craft best-value evaluation factors and then weight those Schedule order or BPA factors to meet particular agency requirements. The FAR directs: “Place the order, or establish the BPA, with the Schedule contractor that represents the best value (see 8.404(d)).” FAR 8.405-2(d). FAR 8.404(d) further provides: “By placing an order against a Schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government’s needs.” In order to accomplish this best value objective, the CO is to provide the evaluation factors to the Schedule contractors as part of the Request for Quotation (RFQ), document the evaluation methodology used, and describe the rationale for any tradeoffs in making the selection. FAR 8.405-2(c)(3)(i), (e)(4), and (e)(5). FAR 8.405-1(c)(3) provides a non-exclusive list (“...the ordering activity may consider, *among other factors...*”) of some non-price factors (e.g., past performance and energy efficiency considerations).

In addition, FAR subpart 8.4 specifically highlights some methods by which Multiple Award Schedule ordering activities can meet their important socioeconomic goals as part of this best-value evaluation. FAR 8.405-5(b) states: “Ordering activities may consider socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA.” In addition, the FAR states that ordering activities “should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.” FAR 8.504-5(c). In no place does the FAR restrict the use of socioeconomic status only to that of a tie-breaker for quotes of equal price.

The rationale and background for Federal Acquisition Circular (FAC) 2001-24 which brought the foregoing FAR 8.405-5 language on socioeconomic status into the FAR in July 2004² is found in the applicable *Federal Register* notice. The language in that notice is particularly instructive as to the intent of those FAR changes: expanding the use of socioeconomic status as a Schedule ordering evaluation factor. The notice in the *Federal Register* explained:

- “[The rule] ...[a]dds additional language to allow for consideration of socioeconomic status when identifying the potential competitors for an order” 69 *Fed. Reg.* 34231, June 18, 2004.
- [In the response to Question 6 on Schedule order set-asides, the Councils did not concur with setting aside Schedule orders/BPAs but then said:]

² 69 *Fed. Reg.* 34231, June 18, 2004, effective July 19, 2004.

“However, the Councils did examine ways in which the rule could foster even greater small business participation than that which already exists. The Councils added language at FAR 8.405-5(b) that provides that ‘Ordering activities may consider socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA.’ This language provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.” *Ibid.*, page 34232.

- [In the response to Question 10 on the suggestion to list best value factors for *services* with the comment’s observation that the FAR 8.405-1(c) list of non-price factors (which does not happen to specifically include “socioeconomic status”) was principally for *supplies*] “Do not concur. The language of section 8.405-1(c) is sufficient for purposes of a best value evaluation of basic services such as repair, maintenance, and installation. Section 8.405-1 lists various factors as examples of what may be considered in determining best value. The list is written to be inclusive and not exclusive. **Therefore, agencies have the discretion to consider any other factor that may be important to their best value decision.** In addition, the ordering procedures for services requiring a statement of work require that agencies include the evaluation criteria for selection in the Request for Quotation. Under these ordering procedures, the agencies have the discretion to develop the evaluation criteria that will best meet their needs in determining best value for their requirements.” *Ibid.*, page 34233 [emphasis added].
- [In addressing any adverse impact of the FAC on small businesses, and going to intent of the FAR language to be added] “[T]he final rule does make an amendment to the FAR that could foster even greater small business participation than that which already exists. The amendment provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders. [...] The procedures give small business contractors the opportunity to fairly compete within the broader universe of schedule contractors. These changes ensure that ordering activities have the broad discretion and effective and flexible business solutions to meet agency requirements.” *Ibid.*, page 34234.

Consistent with the foregoing FAR language and intent, GSA has publicly stated its organizational policy regarding broad and permissive use of socioeconomic status as a best value evaluation factor, and even the permissible use of that factor as a primary evaluation factor. Four recent examples of high-level official GSA policy statements or special ordering procedures on this issue include:

1. GSA Acquisition Letter V-05-12 (Office of the Chief Acquisition Officer, D. Drabkin), "Socio-Economic Programs Under Schedules," dated June 6, 2005³ announced the following GSA policy:

"a) When the order is estimated to exceed the micro purchase threshold, ordering activities seeking to use the multiple award schedules program to achieve their agency small businesses goals, may make socioeconomic status a primary evaluation factor when making a best value determination (see FAR 8.405-1 (c)).

b) When a Request For Quote is issued it shall reflect that one of the primary evaluation factors is achieving the agency's socioeconomic goals.

c) When accepting work from a requiring agency, the ordering activity must ask and receive confirmation in writing that the requiring activity desires to achieve one of its socioeconomic goals and indicate which goal specifically.

d) Place a copy of the requirements document with the applicable confirmation in the contract or order file. The Acquisition Plan should indicate which socioeconomic objective to be achieved through the respective acquisition."

[Emphasis added]

2. GSA Office of General Counsel Memorandum "Protest of *FitNet Purchasing Alliance*, B-309911" (Thedlus L. Thompson, Senior Assistant General Counsel), dated September 14, 2007⁴, after discussing why the set-aside provisions of FAR Part 19 do not apply to Schedule orders and BPAs, recognized this well-established agency policy on best-value evaluation and the socioeconomic factor:

"This record [of Schedules support to small business] is built on creating incentives for using small businesses rather than mandates. Under the FSS program, agencies can get credit towards their socioeconomic goals for orders placed with small businesses. Furthermore, FAR § 8.405-5 encourages all agencies to consider at least one small business prior to placing an order under the program. Agencies are advised that they may establish evaluation criteria which give weight to socioeconomic factors in their best value analysis. By encouraging agencies to consider small businesses and allowing credit toward socioeconomic goals, the Schedules program has successfully used a market-based approach to creating small business opportunity." [Page 4, emphasis added]

3. GSA Deputy Associate Administrator Michael J. Rigas, in October 29, 2007 public testimony before the U.S. Senate Committee on Small Business and Entrepreneurship⁵ echoed the same agency policy on the

³ Expiration date extended to June 6, 2009 by GSA Acquisition Letter V-05-12 Supplement 3 dated June 6, 2008. GSA Acquisition Letters are available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=19589

⁴ Found at http://www.schedulesolutions.net/files/114885-107207/20070914_gsa_legal_comments_in_fitnet_b_3099111.pdf

⁵ <http://sbc.senate.gov/hearings/testimony/071029-Rigas-testimony.pdf>

broad use of socioeconomic status in Schedules ordering as found in the GSA Acquisition Letter:

“The ordering procedures applicable to the Schedules Program make it easier for GSA and other agencies to reach small businesses. Contracting officers ordering via GSA’s Schedules may make socioeconomic status a primary evaluation factor when making a best value determination, and, GSA specifically asks our customers about their socioeconomic goals when we conduct an assisted acquisition.” [Page 4, emphasis added]

4. GSA ***Multiple Award Schedules Desk Reference [2008]***⁶, the widely-distributed primary agency reference for Schedules ordering includes the following special ordering procedures:
- [Page 18] “Factors that may be considered in determining “Best Value” are listed below. The list is not exhaustive and other factors may also be included. [...] 11. Socioeconomic status.”
 - [Page 29, under *Nuts and Bolts Tip*, emphasis added] “It is important to remember that socioeconomic status can be utilized as a primary evaluation factor in source selection.”
 - [Page 45] “Ordering activities may consider socioeconomic status when identifying contractors for consideration or competition for award of an order or Schedule BPA.”

E. CONCLUSION.

There does not appear to be any controlling authority prohibiting the designation and weighting of a “Socioeconomic Status” evaluation factor for Schedule BPAs and orders nor is there any restriction on the use of such a factor only to break ties on quotes of equal price. In view of the clear FAR intent and consistent GSA policy on broad, discretionary use of such a best-value factor, the inclusion of socioeconomic status as an evaluation factor appears to be a matter within the reasonable discretion of the Contracting Officer.

⁶ The *Multiple Award Schedule Desk Reference*, GSA publication 5-08-00265 (Summer 2008), is posted at, and available for order from, the GSA CMLS website:
http://apps.fas.gsa.gov/cmls/viewpdf.cfm?viewpdf=yes&fm_nbr=http://insite.fas.gsa.gov/cmls_insite/pdf/5-08-00265.pdf&CFID=5316&CFTOKEN=24390491